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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1972

No. 72-274

ALLEN COHEN, *Petitioner*

vs.

RICHARD HONGISTO, Sheriff of the City and County of San Francisco, et al., *Respondents*

and

THE PEOPLE OF THE STATE OF CALIFORNIA, *Real Party in Interest*

PETITIONER'S REPLY TO RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

THE CASE IS PROPERLY BEFORE THIS COURT

Respondents argue that this case is not ripe for review because the order of the United States Court of Appeals remanded the case to the District Court "for consideration of the question of jurisdiction" in light of the decisions in *Choung v. Misterly*, 456 F.2d 176 (9th Cir. 1972) (certiorari pending, No. 71-1672), *Matysek v. United States*, 339 F.2d 389 (9th Cir. 1964)

"and other relevant authority". The other relevant authority, the Attorney General speculates in this Court (he would not likely so speculate were the case remanded to the District Court) might conceivably result in the conclusion that the District Court is free to hold that petitioner is "in custody" within the meaning of 28 U.S.C. §2441 and that the District Court has authority to grant relief. But the "other relevant authority" referred to by the Court of Appeals is obviously *Hensley v. Municipal Court*, 453 F.2d 1242 (9th Cir. 1972) (certiorari granted, No. 71-1248) which, like *Choung* and *Matysek*, unambiguously holds that one who is not physically in custody is not "in custody" for purposes of habeas corpus jurisdiction.

There is nothing opaque about the Court of Appeals' judgment in this case. It directs the District Court to consider the jurisdictional question in light of Ninth Circuit authorities which make it abundantly clear that the District Court lacks jurisdiction to entertain the Petition for Writ of Habeas Corpus.

The remand to the District Court, then, is nothing but a formality. Pursuant to the judgment of the Ninth Circuit, the District Court on remand has but the ministerial power to dismiss the habeas action. Accordingly, even if this Petition for Certiorari were directed to a state court, the judgment below would be deemed a final judgment for jurisdictional purposes. See, e.g., *Pope v. Atlantic Coastline R. Co.*, 345 U.S. 379, 382 (1953); *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948); *Cole v. Violette*, 319 U.S. 581 (1943).

But this Certiorari petition is directed to a United States Court of Appeals, and not a state court where considerations of comity and different statutory provisions control. Unquestionably, this Court has jurisdiction to consider, on certiorari, the order and judgment of the court below. See, e.g., *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *The Conqueror*, 166 U.S. 110, 113 (1897).

Because the decision below leaves the District Court no task other than a ministerial one, this case is ripe for review.

II.

A CRIMINALLY CONVICTED PERSON WHO HAS BEEN SENTENCED TO PAY A FINE IS "IN CUSTODY" WITHIN THE MEANING OF 28 U.S.C. §2241.

That one who has been sentenced to pay a fine is restrained of his liberty seems self-evident. We have discussed the question at pp. 7-13 of the Petition for Writ of Certiorari. No purpose would be served by repeating the points and authorities there set forth.

Respondents only repost to our contention that the Ninth Circuit's construction of the "custody" requirements of federal habeas would insulate state decisions from federal review when a fine is imposed, is the observation that this Court's certiorari jurisdiction will be available. Response in Opposition to Petition for Writ of Certiorari, pp. 6-7.

Given the limited number of cases this Court can review, the remedy, in most such cases, is illusory. Moreover, a rule requiring all persons seeking federal

review of fines imposed by criminal process to look exclusively to this Court seems, to say the very least, unwise. Certiorari petitions are not so rare that this Court needs a rule to stimulate their flow.

CONCLUSION

Respondent suggests that there is more to this case than a fine; that perhaps petitioner also must serve probation for his offense of selling a poem. Petitioner has never had the probation sentence stayed and, as far as he knows, the probation expired years ago. In any event, the Court of Appeals has held that there is no federal relief for the alleged violation of his First Amendment rights because he is not in physical custody. For the reasons explained in our Petition for Writ of Certiorari the Ninth Circuit, we think, erred. Their decision should be reviewed by this Court; this case is the natural companion to *Hensley v. Municipal Court*, No. 71-1428, certiorari granted, October 10, 1972.

Dated, December 5, 1972.

Respectfully submitted,

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